

1 MESSNER REEVES LLP
Charles C. Cavanagh (CA State Bar No. 198468)
2 Allison Dodd (*Pro Hac Vice Application*)
1430 Wynkoop Street, Suite 300
3 Denver, Colorado 80202
Telephone: (303) 623-1800
4 Facsimile: (303) 623-0552
E-mail: ccavanagh@messner.com
5 adodd@messner.com

6 SHEPPARD, MULLIN, RICHTER & HAMPTON, LLP
Sascha Henry (CA State Bar No. 191914)
7 333 South Hope Street, 43rd Floor
Los Angeles, California 90071
8 Telephone: (213) 620-1780
Facsimile: (213) 620-1398
9 E-mail: shenry@sheppardmullin.com

10 Attorneys for Defendant
CHIPOTLE MEXICAN GRILL, INC.
11
12

13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15

16 MARTIN SCHNEIDER, SARAH
DEIGERT, LAURIE REESE
17 THERESA GAMAGE, TIFFANIE
ZANGWILL, and NADIA PARIKKA,
18 individually and on behalf of all others
similarly situated,

19 Plaintiffs,

20 v.

21 CHIPOTLE MEXICAN GRILL, INC.,
22 a Delaware corporation,

23 Defendant.
24
25
26
27
28

Case No.: 3:16-cv-02200-HSG

**NOTICE OF MOTION AND
MOTION OF DEFENDANT
CHIPOTLE MEXICAN GRILL, INC.
TO DISMISS COMPLAINT**

[Fed. R. Civ. Proc. 12(b)(1) & 12(b)(6)]

Judge: Hon. Haywood S. Gilliam, Jr.
Ct. Rm.: 10 (San Francisco Courthouse)
Hearing Date: July 28, 2016
Hearing Time: 2:00 p.m.

Action Filed: April 22, 2016
Trial Date: Not Set

1 TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

2 NOTICE IS HEREBY GIVEN that, on July 28, 2016, at 2:00 p.m., or as soon
 3 thereafter as counsel may be heard by the Honorable Haywood S. Gilliam, Jr., in
 4 courtroom 10 of the above-titled Court, located at 450 Golden Gate Avenue, San
 5 Francisco, California 94102, defendant Chipotle Mexican Grill, Inc. (“Chipotle”)
 6 will, and hereby does, move the Court for an Order dismissing, without leave to
 7 amend, the Complaint (“Complaint”) filed by plaintiffs Martin Schneider, Sarah
 8 Deigert, Laurie Reese, Theresa Gamage, Tiffanie Zangwill and Nadia Parikka
 9 (“Plaintiffs”). In the alternative, Chipotle moves for an Order dismissing, without
 10 leave to amend, those portions of the Complaint that fail to state a claim upon which
 11 relief can be granted.

12 This Motion is made on the following grounds:

13 1. Plaintiffs fail to state a claim because no reasonable consumer would be
 14 deceived by Chipotle’s “Non-GMO Claims.” *See Williams v. Gerber Prods. Co.*,
 15 552 F.3d 934 (9th Cir. 2008); *Freeman v. Time, Inc.*, 68 F.3d 285 (9th Cir. 1995);
 16 *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496 (2003); *Zlotnick. v. Premier*
 17 *Sales Grp., Inc.*, 480 F.3d 1281, 1284 (11th Cir. 2007); *Luskin’s, Inc. v. Consumer*
 18 *Protection Div.*, 353 Md. 335, 345-358 (1999); *Druyan v. Jagger*, 508 F. Supp. 2d
 19 228, 244 (S.D.N.Y. 2007).

20 2. Plaintiffs fail to state a claim for intentional misrepresentation and
 21 negligent misrepresentation because neither claim can be based on alleged omissions.
 22 *See Conte v. Wyeth, Inc.*, 168 Cal. App. 4th 89, 101 n.7 (2008); *Apollo Capital Fund,*
 23 *LLC v. Roth Capital Partners, LLC*, 158 Cal. App. 4th 226, 243 (2007).

24 3. Plaintiffs fail to state a claim for intentional misrepresentation and
 25 negligent misrepresentation because they have not alleged that Chipotle has made a
 26 false statement. *See Service by Medallion, Inc. v. Clorox Co.*, 44 Cal. App. 4th 1807,
 27 1816 (1996); *Diediker v. Peelle Fin. Corp.*, 60 Cal. App. 4th 288, 297 (1997).

1 4. Plaintiffs lack standing to pursue prospective injunctive relief. *See*
2 *Wang v. OCZ Tech. Grp., Inc.*, 276 F.R.D. 618 (N.D. Cal. 2011); *Hodgers-Durgin v.*
3 *de la Vina*, 199 F.3d 1037 (9th Cir. 1999).

4 5. Plaintiffs fail to state a claim for unjust enrichment because unjust
5 enrichment is not a recognized cause of action. *Lauriedale Assoc., Ltd. v. Wilson*, 7
6 Cal. App. 4th 1439, 1448 (1992); *McKell v. Washington Mut., Inc.*, 49 Cal. App. 4th
7 1457, 1490 (2006).

8 6. Plaintiffs fail to state a claim for declaratory relief because they have not
9 alleged an actual controversy between the parties. *See* 28 U.S.C. § 2201(a).

10
11 This Motion is based upon this Notice of Motion and Motion; the attached
12 Memorandum of Points and Authorities; the concurrently-filed Request for Judicial
13 Notice; all the pleadings and papers on file in this action; and upon such oral
14 argument and other matters as may be presented to the Court at the time of the
15 hearing.

16
17 Dated: May 17, 2016 MESSNER REEVES, LLP
18 SHEPPARD, MULLIN, RICHTER & HAMPTON, LLP

19
20 By: /s/ Sascha Henry
21 Sascha Henry
22 Attorneys for Defendant
23 CHIPOTLE MEXICAN GRILL, INC.
24
25
26
27
28

STATEMENT OF THE ISSUES TO BE DECIDED

This Motion raises the following issues:

1. Whether the Complaint fails to state a claim under the California Consumers Legal Remedies Act (“CLRA”), the California False Advertising Law (“FAL”), the California Unfair Competition Law (“UCL”), the Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”), the Maryland Consumer Protection Act (“MCPA”) and Sections 349 and 350 of the New York General Business Law (“Sections 349 and 350”) because no reasonable consumer would be deceived by Chipotle’s “Non-GMO Claims.”
2. Whether the Complaint fails to state a claim for intentional and/or negligent misrepresentation because Plaintiffs claims are based on alleged omissions.
3. Whether the Complaint fails to state a claim for intentional and/or negligent misrepresentation because Plaintiffs have not alleged that Chipotle has made a false representation.
4. Whether Plaintiffs lack standing to pursue the prospective injunctive relief sought through the Complaint.
5. Whether the Complaint fails to state a claim for unjust enrichment because unjust enrichment is not a recognized cause of action.
6. Whether the Complaint fails to state a claim for declaratory relief because Plaintiffs have not alleged an actual controversy between the parties.

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. PLAINTIFFS’ ALLEGATIONS.....	3
A. Chipotle’s Representations About Its Use Of “Non-GMO Ingredients.”	3
1. Representations Quoted Or Depicted In The Complaint.....	3
2. Representations Not Quoted Or Depicted In The Complaint.....	5
B. Plaintiffs’ Alleged Purchases From Chipotle.	6
III. PROCEDURAL HISTORY	6
IV. APPLICABLE LEGAL STANDARDS	7
V. ARGUMENT	8
A. Plaintiffs Fail To State A Claim Under The “Reasonable Consumer” Test.....	8
1. The Reasonable Consumer Who Read Chipotle’s Website Would Not Be Deceived By Chipotle’s “Non-GMO Claims.”	10
2. The Reasonable Consumer Would Not Be Deceived By The “Non-GMO Claims” Quoted Or Depicted In The Complaint.....	14
3. Plaintiffs’ Allegations Regarding Consumers’ Purported Understanding Of Terms And Representations Other Than Chipotle’s “Non-GMO Claims” Are Irrelevant.	17
B. Plaintiffs Fail To State A Claim For Misrepresentation.....	19
C. Plaintiffs Lack Standing To Pursue Injunctive Relief.	20
D. Plaintiffs Fail To State A Claim For Unjust Enrichment And Declaratory Relief.	21
VI. CONCLUSION	22

TABLE OF AUTHORITIES

	Page(s)
<u>Cases</u>	
<i>Apollo Capital Fund, LLC v. Roth Capital Partners, LLC</i> 158 Cal. App. 4th 226 (2007).....	20
<i>Ashcroft v. Iqbal</i> 556 U.S. 662 (2009)	7
<i>Balser v. Hain Celestial Group, Inc.</i> -- Fed. App'x --, 2016 WL 696507 (9th Cir. Feb. 22, 2016)	12
<i>Balser v. Hain Celestial Group, Inc.</i> 2013 WL 6673617 (C.D. Cal. Dec. 18, 2013).....	12
<i>Bell Atl Corp. v. Twombly</i> 550 U.S. 544 (2007)	7
<i>Cafasso v. Gen. Dynamics C4 Sys., Inc.</i> 637 F.3d 1047 (9th Cir. 2011)	8
<i>Carrea v. Dreyer's Grand Ice Cream</i> 475 F. App'x 113 (9th Cir. 2012).....	9, 14
<i>Conte v. Wyeth, Inc.</i> 168 Cal. App. 4th 89 (2008)	20
<i>Davis v. HSBC Bank Nev., N.A.</i> 691 F.3d 1152 (9th Cir. 2012)	8
<i>Diediker v. Peelle Fin. Corp.</i> 60 Cal. App. 4th 288 (1997)	20
<i>Druyan v. Jagger</i> 508 F. Supp. 2d 228 (S.D.N.Y. 2007)	8
<i>Ebner v. Fresh, Inc.</i> -- F.3d. --, 2016 WL 1056088 (9th Cir. Mar. 17, 2016).....	9, 14
<i>Erickson v. Pardus</i> 551 U.S. 89 (2007)	7

1	<i>Fink v. Time Warner Cable</i>	
2	714 F.3d 739 (2d Cir. 2013)	10
3	<i>Gallagher v. Chipotle Mexican Grill</i>	
4	2016 WL 454083 (February 5, 2016).....	1, 10, 18, 20, 21
5	<i>Hariston v. S. Beach Beverage</i>	
6	2012 WL 1893818 (C.D. Cal. May 18, 2012).....	13
7	<i>Hill v. Roll Int’l Corp.</i>	
8	195 Cal. App. 4th 1295 (2011).....	9, 21
9	<i>Ileto v. Glock, Inc.</i>	
10	349 F.3d 1191 (9th Cir. 1995)	7
11	<i>Kane v. Chobani, Inc.</i>	
12	2013 WL 5289253 (N.D. Cal. Sept. 19, 2013).....	12
13	<i>Kearns v. Ford Motor Co.</i>	
14	567 F.3d 1120 (9th Cir. 2009)	8
15	<i>Knieval v. ESPN</i>	
16	393 F.3d 1068 (9th Cir. 2005)	11
17	<i>Lauriedale Assoc., Ltd. v. Wilson</i>	
18	7 Cal. App. 4th 1439 (1992)	21
19	<i>Lavie v. Procter & Gamble Co.</i>	
20	105 Cal. App. 4th 496 (2003)	9
21	<i>Luskin’s, Inc. v. Consumer Protection Div.</i>	
22	353 Md. 335 (1999)	8
23	<i>Manchouck v. Mondelez Int’l, Inc.</i>	
24	2013 WL 5400285 (N.D. Cal. Sept. 26, 2013).....	14
25	<i>McKell v. Washington Mut., Inc.</i>	
26	142 Cal. App. 4th 1457 (2006)	21
27	<i>McKinnis v. Kellogg USA</i>	
28	2007 WL 4766060 (C.D. Cal. Sept. 19, 2007).....	9
	<i>McKinnis v. Sunny Delight Beverages Co.</i>	
	2007 WL 4766525 (C.D. Cal. Sept. 4, 2007).....	14

1	<i>Pelayo v. Nestle USA, Inc.</i>	
2	989 F. Supp. 2d 973 (2013)	9, 13, 17
3	<i>Rooney v. Cumberland Packing Corp.</i>	
4	2012 WL 1512106 (S.D. Cal. Apr. 16, 2012)	13
5	<i>Service by Medallion, Inc. v. Clorox Co.</i>	
6	44 Cal. App. 4th 1807 (1996)	20
7	<i>Steel Co. v. Citizens for a Better Env't</i>	
8	523 U.S. 83 (1998)	8
9	<i>Stuart v. Cadbury Adams USA, LLC</i>	
10	458 F. App'x 689 (9th Cir. 2011)	14
11	<i>Sugawara v. Pepsico, Inc.</i>	
12	2009 WL 1439115 (E.D. Cal. May 21, 2009)	13
13	<i>Videtto v. Kellogg USA</i>	
14	2009 WL 1439086 (E.D. Cal. May 21, 2009)	14
15	<i>Viggiano v. Hansen Natural Corp.</i>	
16	944 F. Supp. 2d 877 (C.D. Cal. May 13, 2013)	13
17	<i>Williams v. Gerber Prods. Co.</i>	
18	552 F.3d 934 (9th Cir. 2008)	8, 12
19	<i>Zlotnick. v. Premier Sales Grp., Inc.</i>	
20	480 F.3d 1281 (11th Cir. 2007)	8
21	<u>Statutes</u>	
22	California	
23	Consumer Legal Remedies Act, Cal. Civ. Code § 1750, <i>et seq.</i>	3, 8, 14
24	False Advertising Law, Cal. Bus. & Prof. Code § 17500, <i>et seq.</i>	3, 8, 14
25	Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, <i>et seq.</i>	3, 8, 14
26	Connecticut	
27	2013 Conn. Legis. Serv. p. A. 13-183	16
28	Federal	
	28 U.S.C. § 2201(a)	21
	Florida	
	Fla. Stat. § 501.201, <i>et seq.</i>	3, 12

1	Maine	
2	22 MRSA §§ 2591-2596	16
3	Maryland	
4	Consumer Protection Act, MD. Code Ann. §§ 13-101, <i>et seq.</i>	3, 12
5	New York	
6	Gen. Bus. Law § 349, <i>et seq.</i>	3
7	Gen. Bus. Law § 350, <i>et seq.</i>	3
8	Vermont	
9	Vt. CP 121.03(a)(i)	16
10	<u>Other Authorities</u>	
11	Federal Rule of Civil Procedure	
12	9(b).....	8
13	12(b)(1)	8
14	12(b)(6)	7, 14
15	12(f)	7

14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is the second lawsuit filed in this Court against Chipotle Mexican Grill, Inc. (“Chipotle”) by Plaintiffs’ counsel relating to Chipotle’s announcement on April 27, 2015, that it had “‘achieved its goal of moving to only non-GMO ingredients to make all of the food in its U.S. restaurants.’” Previously, Plaintiffs’ counsel had filed *Colleen Gallagher v. Chipotle Mexican Grill, Inc.*, 15-CV-3952 (HSG), and the Court had dismissed, with leave to amend, Ms. Gallagher’s complaint. In *Gallagher*, the plaintiff had “not alleged that any of the ‘ingredients’” in Chipotle’s food “have ‘been altered using . . . genetic engineering techniques.’” (RJN, Exh. 1, p. 6; *Gallagher v. Chipotle Mexican Grill*, 2016 WL 454083, *4 (February 5, 2016).) Here, Plaintiffs are still unable to allege that the ingredients in Chipotle’s food have been altered using genetic engineering techniques. Thus, as in *Gallagher*, the complaint should be dismissed.

Chipotle owns and operates a chain of “fast casual” restaurants that serves a focused menu of Mexican-inspired fare, consisting primarily of burritos, tacos and salads. (*See* Complaint, ¶ 15.) Six Plaintiffs – this time not including Ms. Gallagher – purport to assert eight claims on behalf of putative plaintiff classes from four different states.

Plaintiffs assert that all of Chipotle’s “Non-GMO Claims” – which they define to mean “that its food is made with ‘only non-GMO ingredients’...” (Complaint, ¶ 40) – are deceptive because Chipotle uses meat and dairy ingredients sourced from animals that may have consumed GMO feed and because Chipotle serves third-party soft drinks that contain GMOs. (*See id.* at ¶ 41.) Plaintiffs’ allegations of deception are not plausible because Chipotle’s website – which, by definition, is among the “Non-GMO Claims” challenged by Plaintiffs – expressly states:

The meat and dairy products we buy come from animals that are not genetically modified. But it is important to note that most animal feed

1 in the U.S. is genetically modified, which means that the meat and
2 dairy served at Chipotle are likely to come from animals given at least
3 some GMO feed. ... [¶] Many of the beverages sold in our
4 restaurants contain genetically modified ingredients, including those
5 containing high fructose corn syrup, which is almost always made
6 from GMO corn.

7 (*Food With Integrity, G-M-Over It*, Chipotle, <http://chipotle.com/gmo> [“GMO
8 Webpage”] [RJN, Exh. 3] [cited at Complaint, ¶¶ 35, 37].) The reasonable consumer
9 cannot interpret this language to mean either that Chipotle’s ingredients are “not
10 sourced from animals that were raised on GMO” (Complaint, ¶¶ 50-55) or that
11 Chipotle does not serve third-party soft drinks containing GMOs. Therefore,
12 Plaintiffs cannot plausibly allege that Chipotle’s “Non-GMO Claims” are either false
13 or deceptive.

14 Moreover, Plaintiffs’ claims fail even if the information contained on Chipotle’s
15 website were not considered. The “Non-GMO Claims” quoted and depicted in the
16 Complaint confirm that Chipotle uses the term “non-GMO” only when talking about
17 the ingredients of its food. (*See id.* at ¶¶ 1, 31, 34-38.) Thus, when Plaintiffs allege
18 that they understood Chipotle’s “Non-GMO Claims” to mean that its ingredients are
19 “not sourced from animals that were raised on GMO” feed (*id.* at ¶¶ 50-55) or that
20 the third-party soft drinks that it offers for sale do not contain GMOs, what Plaintiffs
21 are really saying is that they understood Chipotle’s representations regarding the
22 “non-GMO” nature of the “ingredients” of its “food” to extend beyond the
23 ingredients of its food. It is simply not plausible that the reasonable consumer would
24 interpret Chipotle’s “Non-GMO Claims” in this manner. Chipotle’s “Non-GMO
25 Claims” are phrased in everyday language that is readily understood by the
26 reasonable consumer, and the “Non-GMO Claims” quoted and depicted in the
27 Complaint say nothing – one way or the other – about either the nature of the feed
28

consumed by the animals from which Chipotle sources its meat and dairy ingredients or the third-party soft drinks that it offers.

For these reasons, and for others discussed below, Plaintiffs' claims fail.

II. PLAINTIFFS' ALLEGATIONS

Plaintiffs contend that Chipotle's "Non-GMO Claims" are reasonably understood by consumers to "mean that Chipotle's menu is 100% free of GMOs" and that they are deceptive because Chipotle serves meat and dairy ingredients sourced from animals that may have consumed GMO feed and because it offers third-party soft drinks that may contain GMOs. (Complaint, ¶ 2.)

Plaintiffs allege that their theories support the following causes of action:

(1) violation of the California Consumer Legal Remedies Act, Cal. Civ. Code § 1750, *et seq.* (the "CLRA"); (2) violation of the California False Advertising Law, Cal. Bus. & Prof. Code § 17500, *et seq.* (the "FAL"); (3) violation of the California Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, *et seq.* (the "UCL"); (4) violation of the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.201, *et seq.* (the "FDUTPA"); (5) violation of the Maryland Consumer Protection Act, MD. Code Ann. § 13-101, *et seq.* (the "MCPA"); (6) violation of New York Gen. Bus. Law § 349, *et seq.* ("section 349"); (7) violation of New York Gen. Bus. Law § 350, *et seq.* ("section 350"); (8) unjust enrichment; (9) misrepresentation; and (10) declaratory relief.

A. Chipotle's Representations About Its Use Of "Non-GMO Ingredients."

1. Representations Quoted Or Depicted In The Complaint.

The Complaint quotes or depicts several examples of Chipotle's "Non-GMO Claims," none of which state or imply anything about either the nature of the feed consumed by the animals from which Chipotle sources its meat and dairy ingredients or the third-party soft drinks that it offers.

In a press release – titled "Chipotle Becomes the First National Restaurant Company to Use Only Non-GMO Ingredients" – Chipotle announced that it had

1 “achieved its goal of moving to only non-GMO ingredients to make all of the food
 2 in its U.S. restaurants.” (Complaint, ¶ 31 [quoting Press Release {RJN, Exh. 4}].)
 3 Chipotle explains that “GMOs, or genetically modified organisms, are crops that
 4 have had specific changes introduced to their DNA that don’t occur naturally, using
 5 the science of genetic engineering.” (Press Release [RJN, Exh. 4].) Chipotle also
 6 invites consumers interested in “more information about Chipotle’s ingredients and
 7 its move to non-GMO foods, [to] visit www.chipotle.com/gmo.” (*Id.*; *see also* GMO
 8 Webpage [RJN, Exh. 3].)

9 In an overhead menu panel displayed in its restaurants, Chipotle talks of
 10 “striving to make *our ingredients* better” by replacing GMOs with “non-GMO
 11 ingredients” and directs consumers to “CHIPOTLE.COM/GMO.” (Complaint, ¶ 35
 12 [emphases added].)

13 The restaurant door graphic depicted in the Complaint announces Chipotle’s
 14 “Farewell To GMOs” with the statement: “When it comes to *our food*, genetically
 15 modified *ingredients* don’t make the cut.” and directs consumers interested in
 16 learning more to “CHIPOTLE.COM/GMO.” (*Id.* at ¶ 37 [emphasis added].)

17 On another overhead menu panel, around pictures only of ingredients used in
 18 food products prepared in its restaurants, Chipotle explains: “We *prepare our*
 19 delicious *ingredients* simply, using classic *cooking* techniques, without added sugar,
 20 artificial sweetener, flavors, or colors. This includes ... only non-GMO ingredients.”
 21 (*Id.* at ¶¶ 1 & 38 [emphases added].)

22 “On Twitter, Chipotle announced ... : ‘We’re now making all of the food at
 23 our US restaurants with only non-GMO ingredients....’” (*Id.* at ¶ 34.)¹

24 As Plaintiffs admit, another graphic depicted in the Complaint represents that
 25 Chipotle’s “food is ‘made with no-GMO ingredients.’” (*Id.* at ¶ 36.)

26 _____
 27 ¹ It is apparent that the language tweet depicted in paragraph 34 that refers to
 28 Chipotle having a “GMO free menu” originated from “BUSINESSINSIDER.COM,”
 not Chipotle.

2. Representations Not Quoted Or Depicted In The Complaint.

Because the “Non-GMO Claims” challenged by Plaintiffs expressly are “not limited to those set forth in this Complaint” (Complaint, ¶ 40), Chipotle’s representations outside the Complaint must also be considered.

On the GMO Webpage that is specifically called out in the Press Release, restaurant door graphic and one of the overhead menu panels relied upon in the Complaint, Chipotle defines “GMO” as an organism “created by inserting genes from one species (typically bacteria or a virus) into the DNA of another.” (GMO Webpage [RJN, Exh. 3].) Chipotle explains that, “as we have learned more about GMO’s, we’ve decided that using them in *our food* doesn’t align with [our] vision.” (*Id.* [emphasis added].) Accordingly, Chipotle announced that, “[w]hen it comes to *our food*, genetically modified *ingredients* don’t make the cut.” (*Id.* [emphasis added]; *see also id.* [“Why did we remove GMOs from *our food*?”; “Which *ingredients* in *Chipotle’s food* were previously genetically modified?”] [emphases added].)

On that same webpage, under the heading “What About Beverages and Animal Feed?,” Chipotle states:

The meat and dairy products we buy come from animals that are not genetically modified. But it is important to note that most animal feed in the U.S. is genetically modified, which means that the meat and dairy served at Chipotle are likely to come from animals given at least some GMO feed. We are working hard on this challenge, and have made substantial progress: for example, the 100% grass-fed beef served in many Chipotle restaurants was not fed GMO grain—or any grain, for that matter. [¶] Many of the beverages sold in our restaurants contain genetically modified ingredients, including those containing high fructose corn syrup, which is almost always made from GMO corn.

(*Id.*)

B. Plaintiffs’ Alleged Purchases From Chipotle.

Plaintiffs allege that, collectively, they purchased from Chipotle during the Class Period differing combinations of food items that included various meat and dairy ingredients, as well as some third-party soft drinks. (*See* Complaint, ¶¶ 50-55.)

Plaintiffs further allege that, prior to their respective purchases, each of them “was aware of and was exposed to Chipotle’s ‘Food With Integrity’ campaign” and that each of them was “exposed to and relied on Chipotle’s media campaign....” (*Id.*) None of Plaintiffs deny that the “‘Food With Integrity’ campaign” and the “media campaign” to which each of them was exposed, and on which each of them relied, included Chipotle’s website. Nevertheless, Plaintiffs further allege that each of them interpreted these campaigns “to mean that Chipotle’s menu did not contain GMOs and was not sourced from animals that were raised on GMO” feed. (*Id.*)

III. PROCEDURAL HISTORY

Colleen Gallagher filed her Complaint on August 28, 2015 against Chipotle in the captioned *Gallagher v. Chipotle Mexican Grill, Inc.* 15-CV-3952 (HSG).

Chipotle’s Motion to Dismiss the Complaint was heard on January 14, 2016. At the hearing, the Court raised concerns regarding Ms. Gallagher’s failure to allege what she actually purchased from Chipotle, and the Court and Plaintiffs’ counsel agreed that Ms. Gallagher would be afforded leave “to amend to address that issue specifically.” (Hearing Transcript [RJN, Exh. 2], p. 5:21-22; *see also id.* at 8:10-15.) After noting that Plaintiff Gallagher had “pled a definition of what ‘GMO’ means that seems inconsistent with [Chipotle’s] ingredients being GMOs,” the Court also stated: “I may well be sending you back on this question of whether you can plead a definition of ‘GMO’ that encompasses what you’re saying....” (*Id.* at 11:22-23 & 19:13-17.)

On February 5, 2016, the Court issued the Order. Consistent with the statements made during the hearing, the Court dismissed the Complaint, but granted Ms. Gallagher leave to file an amended complaint only “if she can in good faith

1 plausibly and specifically allege (1) injury-in-fact, and (2) why and how Defendant's
2 GMO Claims are false or misleading." (Order, p. 7:18-21.)

3 On March 11, 2016, Gallagher and Plaintiffs here filed the FAC, which,
4 beyond attempting to address the deficiencies identified in the Order, added eight
5 new claims and six new Plaintiffs, who purported to represent plaintiff classes in four
6 different states.

7 On March 28, 2016, Plaintiff Gallagher filed a Notice of Voluntary Dismissal
8 and Withdrawal as Named Plaintiff. [Dkt. #42.] On April 4, 2016, the Court struck
9 the new plaintiffs and claims as they exceeded the scope of the leave to amend that
10 the Court had granted. [Dkt. #44.]

11 On April 22, 2016, Plaintiffs filed this action, and the Court issued its Related
12 Case Order on May 2, 2016. [Dkt. #9.]

13 IV. APPLICABLE LEGAL STANDARDS

14 Under Federal Rule of Civil Procedure 12(f), a court may strike a pleading or
15 any portion of a pleading that is "redundant, immaterial, impertinent, or scandalous."

16 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the
17 legal sufficiency of the claims alleged in a complaint. *See Ileto v. Glock, Inc.*, 349
18 F.3d 1191, 1199-1200 (9th Cir. 1995). A plaintiff must plead "enough facts to state a
19 claim to relief that is plausible on its face." *Bell Atl Corp. v. Twombly*, 550 U.S. 544,
20 570 (2007). "The plausibility standard is not akin to a probability requirement, but it
21 asks for more than a sheer possibility that a defendant has acted unlawfully."
22 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Thus, a plaintiff must allege facts
23 sufficient to "raise a right to relief above the speculative level." *Twombly*, 550 U.S.
24 at 555. Although all allegations of material fact are taken as true (*see Erickson v.*
25 *Pardus*, 551 U.S. 89, 93-94 (2007)), conclusory statements not supported by factual
26 allegations may be disregarded. *See Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at
27 555. Likewise, a court need not accept as true allegations contradicted by judicially
28

noticeable facts. *See Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1160 (9th Cir. 2012) (taking judicial notice of defendant’s website and dismissing complaint).

Because Plaintiffs’ claims are premised on allegedly fraudulent conduct, Rule 9(b) also applies. *See Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009). Rule 9(b) requires a plaintiff to “state with particularity the circumstances constituting fraud,” including “the who, what, when, where, and how of the misconduct charged.” *Id.* at 1124. Allegations of fraud must meet both Rule 9(b)’s particularity requirement and *Iqbal*’s plausibility standard. *See Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011).

A defendant may also move to dismiss an action for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). If the plaintiff lacks standing under Article III of the U.S. Constitution, then the court lacks subject matter jurisdiction, and the case must be dismissed. *See Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 101-102 (1998).

V. ARGUMENT

A. Plaintiffs Fail To State A Claim Under The “Reasonable Consumer” Test.

Claims under the FAL, UCL, CLRA, FDUTPA, MCPA and Sections 349 and 350 are all “governed by the ‘reasonable consumer’ test,” which focuses on whether “members of the public are likely to be deceived.” *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008); *see also Zlotnick. v. Premier Sales Grp., Inc.*, 480 F.3d 1281, 1284 (11th Cir. 2007) (Under the FDUTPA, a plaintiff must allege that there is a “representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer’s detriment.”); *Luskin’s, Inc. v. Consumer Protection Div.*, 353 Md. 335, 345-358 (1999) (adopting reasonable consumer standard under the MCPA); *Druyan v. Jagger*, 508 F. Supp. 2d 228, 244 (S.D.N.Y. 2007) (“To state a claim for false advertising or deceptive business practices, a plaintiff must allege ... that the subject advertisement ‘is likely to mislead a reasonable consumer acting reasonably under the circumstances.’”).

1 “[T]he reasonable consumer standard requires a probability ‘that a significant
 2 portion of the general consuming public or of targeted consumers, acting reasonably
 3 in the circumstances, could be misled.’” *Ebner v. Fresh, Inc.*, -- F.3d. --, 2016 WL
 4 1056088, *4 (9th Cir. Mar. 17, 2016). The “reasonable consumer” is not the “least
 5 sophisticated consumer” or an “unwary consumer.” *Hill v. Roll Int’l Corp.*, 195 Cal.
 6 App. 4th 1295, 1304 (2011); *see also Lavie v. Procter & Gamble Co.*, 105 Cal. App.
 7 4th 496, 508 (2003) (“‘Likely to deceive’ implies more than a mere possibility that
 8 the advertisement might conceivably be misunderstood by some few consumers
 9 viewing it in an unreasonable manner.”)

10 Although “[t]he question of whether a business practice is deceptive in most
 11 cases presents a question of fact not amenable to resolution on a motion to dismiss,
 12 ... dismissal is appropriate ... where a Court can conclude as a matter of law that
 13 members of the public are not likely to be deceived....” *Pelayo v. Nestle USA, Inc.*,
 14 989 F. Supp. 2d 973, 978 (2013) (finding allegation that claim that pasta products
 15 were “All Natural” was misleading to be implausible, and granting motion to dismiss,
 16 because “the reasonable consumer is aware that [the pasta products] are not springing
 17 fully formed from Ravioli trees and Tortellini bushes”). Accordingly, several courts
 18 in this circuit have granted motions to dismiss false advertising claims on the basis of
 19 the reasonable consumer standard. *See, e.g., Carrea v. Dreyer’s Grand Ice Cream*,
 20 475 F. App’x 113, 115 (9th Cir. 2012) (affirming dismissal because “[i]t is
 21 implausible that a reasonable consumer would interpret ‘Original Sundae Cone,’
 22 ‘Original Vanilla,’ and ‘Classic,’ to imply that [the defendant’s product] is more
 23 wholesome or nutritious than competing products”); *McKinnis v. Kellogg USA*, 2007
 24 WL 4766060, *6 (C.D. Cal. Sept. 19, 2007) (dismissing, without leave to amend,
 25 claims based on allegations that consumers were misled into believing that “Froot
 26 Loops” cereal contained real fruit).

27 Here, the Court can conclude as a matter of law that members of the public are
 28 not likely to be deceived by Chipotle’s “Non-GMO Claims.” Plaintiffs allege that the

1 “Non-GMO Claims” are deceptive because Chipotle prepares its food with meat and
 2 dairy ingredients sourced from animals that may have consumed GMO feed and
 3 because Chipotle offers third-party soft drinks that contain GMOs. First, Plaintiff
 4 defines “Non-GMO Claims” so broadly that it necessarily include statements made
 5 by Chipotle on its website, and no reasonable consumer who has reviewed Chipotle’s
 6 website could plausibly share Plaintiffs’ alleged interpretation of Chipotle’s “Non-
 7 GMO Claims.” Second, even ignoring Chipotle’s website, the reasonable consumer
 8 could not plausibly interpret the “Non-GMO Claims” quoted or depicted in the
 9 Complaint in the manner alleged by Plaintiffs.

10 1. The Reasonable Consumer Who Read Chipotle’s Website Would Not
 11 Be Deceived By Chipotle’s “Non-GMO Claims.”

12 As this Court has noted, “[t]he primary evidence in a false advertising case is
 13 the advertising itself.” (RJN, Exh. 1, p. 5; 2016 WL 454083 at *3 [quoting *Brockey*
 14 *v. Moore*, 107 Cal. App. 4th 86, 100 (2003)]; *see also Fink v. Time Warner Cable*,
 15 714 F.3d 739, 742 (2d Cir. 2013) [“The primary evidence in a consumer-fraud case
 16 arising out of allegedly false advertising is, of course, the advertising itself.”].)
 17 Moreover, as the Second Circuit explained in *Fink*, “in determining whether a
 18 reasonable consumer would have been misled by a particular advertisement, context
 19 is crucial.” 714 F.3d at 742. For example, “under certain circumstances, the
 20 presence of a disclaimer or similar clarifying language may defeat a claim of
 21 deception.” *Id.* (citing *Freeman v. Time, Inc.*, 68 F.3d 285, 289-290 (9th Cir. 1995)
 22 [upholding dismissal of a challenge to a sweepstakes mailer because it explicitly
 23 stated that the plaintiff would win only if he had the winning number]; *Broder v.*
 24 *MBNA Corp.*, 722 N.Y.S.2d 524, 526 (2001) [“[T]here can be no section 349(a)
 25 claim when the allegedly deceptive practice was fully disclosed....”]). In addition,
 26 “[a] plaintiff who alleges that he was deceived by an advertisement may not misquote
 27 or misleadingly excerpt the language of the advertisement in his pleadings and expect
 28 his action to survive a motion to dismiss, or, indeed, to escape admonishment.” *Id.*

1 (“easily conclud[ing] that Plaintiffs’ claims lack the facial plausibility necessary to
2 survive a motion to dismiss” where “the allegations of the Complaint are materially
3 inconsistent with the sole advertisement Plaintiffs have submitted”).

4 Here, Plaintiffs allege that Chipotle’s broadly-defined “Non-GMO Claims”
5 are, as a whole, deceptive because Chipotle’s meat and dairy ingredients are sourced
6 from animals that may have consumed GMO feed and because Chipotle offers third-
7 party soft drinks that may contain GMOs. (*See* Complaint, ¶¶ 42, 43.)

8 This allegation is not plausible because, as Ms. Gallagher had admitted, but as
9 Plaintiffs now disingenuously try to ignore, “Chipotle concedes in disclaimers that
10 some of its soft drinks contain GMOs, and that its meat and dairy supplies come from
11 animals fed with GMO grains.” (Complaint, ¶ 35 [citing GMO Webpage {RJN, Exh.
12 3}])² Indeed, Chipotle’s GMO Webpage could not be more clear that “the meat and
13 dairy served at Chipotle are likely to come from animals given at least some GMO
14 feed” or that “[m]any of the beverages sold in [its] restaurants contain genetically
15 modified ingredients, including those containing high fructose corn syrup, which is
16 almost always made from GMO corn.” (GMO Webpage [RJN, Exh. 3].)

17 It is not plausible that a consumer who had reviewed these statements could
18 reasonably interpret Chipotle’s “Non-GMO Claims” to mean either that the animals
19 from which its meat and dairy ingredients are sourced had never consumed GMO
20 feed or that the third-party soft drinks that Chipotle offers are necessarily “non-
21 GMO.” *See Ebner*, 2016 WL 1056088, at *5 (holding it was “not plausible” that the
22 reasonable consumer would be deceived as to the amount of lip product in a tube

23
24 ² Because Plaintiffs challenge the representations made on Chipotle’s website, their
25 claims necessarily depend upon Chipotle’s website. Therefore, Plaintiffs cannot
26 object to the Court’s consideration of the website. *See Knievel v. ESPN*, 393 F.3d
27 1068, 1079 (9th Cir. 2005) (The Ninth Circuit has “extended the ‘incorporation by
28 reference’ doctrine to situations in which the plaintiff’s claim depends on the contents
of the document, the defendant attaches the document to its motion to dismiss, and
the parties do not dispute the authenticity of the document, even though the plaintiff
does not explicitly allege the contents of that document in the complaint.”).

1 where the label disclosed the correct weight of the included product.); *Kane v.*
 2 *Chobani, Inc.*, 2013 WL 5289253, at *10 (N.D. Cal. Sept. 19, 2013) (“Because the
 3 labels clearly disclose the presence of the [allegedly unnatural ingredients] it is not
 4 plausible that Plaintiffs believed ... that the [product] did not contain” them.).

5 While Plaintiffs complain that these details are not set forth in writing inside
 6 Chipotle’s restaurants (*see* Complaint, ¶ 45), that fact is irrelevant where Plaintiffs
 7 are challenging *all* of Chipotle’s “Non-GMO Claims” as a whole and in their entirety
 8 (Complaint, ¶ 40).

9 Moreover, the Complaint demonstrates how Chipotle encourages consumers to
 10 review this information – one of the overhead menu panels, the restaurant door
 11 graphic and the press release quoted or depicted in the Complaint each expressly
 12 refer consumers to Chipotle’s GMO Webpage. (*Id.* at ¶¶ 35 & 37; Press Release
 13 [RJN, Exh. 4].)³

14 The broad scope of Plaintiffs’ challenges to all of Chipotle’s “Non-GMO
 15 Claims” renders the Ninth Circuit’s recent reversal of *Balser v. Hain Celestial Group,*
 16 *Inc.*, 2013 WL 6673617 (C.D. Cal. Dec. 18, 2013) irrelevant. *Balser* involved a
 17 challenge to a defendant’s use of the word “natural” on cosmetic products. Relying
 18 on the defendant’s website, the district court concluded, “Defendant actively defines
 19 what its use of natural means, so that no reasonable consumer could be deceived.”
 20 *Id.* at *1. On appeal, the Ninth Circuit reversed dismissal, in part by relying on
 21 *Williams* to conclude that “product information on a website ... cannot override as a
 22 matter of law any misimpressions created by the label.” *Balser v. Hain Celestial*
 23 *Group, Inc.*, -- Fed. App’x --, 2016 WL 696507, *2 (9th Cir. Feb. 22, 2016) (citing
 24 *Williams*, 552 F.3d at 939-940).

25 The reasoning of the Ninth Circuit in *Williams* and *Balser* has no application
 26 here for at least two reasons. First, the Court must consider Chipotle’s website

27 _____
 28 ³ Chipotle’s explicit disclosures necessarily defeat any purported concealment theory
 of liability. (*See* Complaint, ¶¶ 47-49.)

1 because the statements made thereon are among the “Non-GMO Claims” that
2 Plaintiffs challenge as deceptive. Second, the reasoning that defendants cannot rely
3 upon disclaimers to “cure” otherwise deceptive statements does not apply where, as
4 here, the challenged representations do not create any “misimpressions” in the first
5 place. In such situations, where another source simply provides additional details
6 regarding a statement that is not otherwise deceptive, it is appropriate for a court to
7 consider that other source. *See Pelayo*, 989 F. Supp. 2d at 978 (“[T]o the extent there
8 is any ambiguity regarding the definition of ‘All Natural’ with respect to each of the
9 [challenged products], it is clarified by the detailed information contained in the
10 ingredient list.”); *Hariston v. S. Beach Beverage*, 2012 WL 1893818, at *5 (C.D. Cal.
11 May 18, 2012) (“the ingredient list is consistent with the front label statement”);
12 *Rooney v. Cumberland Packing Corp.*, 2012 WL 1512106, *3-5 (S.D. Cal. Apr. 16,
13 2012) (holding that no reasonable consumer could be deceived by the label “Sugar in
14 the Raw” because the package stated in several places that the sugar was processed);
15 *Viggiano v. Hansen Natural Corp.*, 944 F. Supp. 2d 877, 892 n.38 (C.D. Cal. May 13,
16 2013) (“In cases where a product’s front label is accurate and consistent with the
17 statement of ingredients, courts routinely hold that no reasonable consumer could be
18 misled by the label, because a review of the statement of ingredients makes the
19 composition of the [product] clear.”); *Sugawara v. PepsiCo, Inc.*, 2009 WL 1439115,
20 at *1 (E.D. Cal. May 21, 2009) (“If the consumer takes the box from the shelf and
21 examines the fine print of the ingredient list, he or she will discover that the only fruit
22 content is a touch of strawberry fruit concentrate, twelfth in order on the ingredient
23 list.”).

24 Because Chipotle explicitly discloses the facts that Plaintiffs allege were
25 misrepresented, no reasonable consumer could be deceived.
26
27
28

2. The Reasonable Consumer Would Not Be Deceived By The “Non-GMO Claims” Quoted Or Depicted In The Complaint.

Even without looking at the information contained on Chipotle’s website, it is not plausible that the reasonable consumer would interpret Chipotle’s “Non-GMO Claims” in the manner alleged by Plaintiffs.

The Ninth Circuit has stated that “common sense” should be used to resolve false advertising cases at the pleading stage. *See Ebner*, 2016 WL 1056088, at *2 (“Determining whether a complaint states a plausible claim for relief is ‘a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.’”) (quoting *Iqbal*, 556 U.S. at 679); *Carrea*, 475 F. App’x 113 at *115 (dismissing false advertising complaint where theory of liability “strain[ed] credulity”); *Stuart v. Cadbury Adams USA, LLC*, 458 F. App’x 689, 690-691 (9th Cir. 2011) (affirming district court’s conclusion that plaintiff’s claims “defy common sense”). Accordingly, district courts routinely dismiss false advertising claims pursuant to Rule 12(b)(6). *See Manchouck v. Mondelez Int’l, Inc.*, 2013 WL 5400285, at *2 (N.D. Cal. Sept. 26, 2013) (“Plaintiff has not plausibly alleged why the statement ‘made with real fruit’ would not include mechanically separated fruit puree.”); *Videtto v. Kellogg USA*, 2009 WL 1439086, at *1-3 (E.D. Cal. May 21, 2009) (dismissing, without leave to amend, CLRA, FAL and UCL claims based on allegations that consumers were misled by images of fruits into believing that “Froot Loops” cereal contained “real, nutritious fruit”); *McKinnis v. Sunny Delight Beverages Co.*, 2007 WL 4766525, at *4 (C.D. Cal. Sept. 4, 2007) (“no reasonable consumer, upon review of the label as a whole ... would conclude Defendant’s products contain significant quantities of fruit or fruit juice”).

Here, Plaintiffs have not proffered a single representation by Chipotle that its “Non-GMO Claims” extend to either the feed consumed by the animals from which it sources its meat and dairy ingredients or the third-party soft drinks that it offers.

1 To the contrary, the representations quoted or depicted in the Complaint
 2 convey to the reasonable consumer that Chipotle’s “Non-GMO Claims” apply only to
 3 the *ingredients* of the *food* prepared by it in its restaurants:

- 4 • In the title of the press release – “Chipotle Becomes the First National
 5 Restaurant Company to Use Only Non-GMO Ingredients” – through which it
 6 announced its move to only “non-GMO ingredients,” Chipotle used the term
 7 “non-GMO” to qualify only the word “ingredients.” (Complaint, ¶ 31; RJN,
 8 Exh. 4.) Likewise, in the first sentence of that press release, Chipotle
 9 announces that it had “achieved its goal of moving to only non-GMO
 10 ingredients to make all of the food in its U.S. restaurants...” (*Id.*) Nothing in
 11 either statement – or in any of the other statements made in the press release –
 12 suggests that Chipotle’s “non-GMO” representation extends to anything other
 13 than the “ingredients” of its “food.”
- 14 • On Twitter, Chipotle announced: “We’re now making all of the food at our
 15 US restaurants with only non-GMO ingredients.” (Complaint, ¶ 34.)
- 16 • One of the overheard menu panels depicted in the Complaint contains pictures
 17 only of ingredients used in food products Chipotle prepares in its restaurants
 18 and explains: “We *prepare our* delicious *ingredients* simply, using classic
 19 *cooking* techniques, without added sugar, artificial sweetener, flavors, or
 20 colors. This includes ... only non-GMO ingredients.” (*Id.* at ¶¶ 1 & 38
 21 [emphases added].) No reasonable consumer would interpret this
 22 representation to extend beyond the “ingredients” of the food “prepared” or
 23 “cooked” at Chipotle.
- 24 • In another overhead menu panel, Chipotle talks of “striving to make *our*
 25 *ingredients* better” by replacing GMOs with “non-GMO ingredients.” (*Id.* at
 26 ¶ 35 [emphasis added].)

- The “Farewell To GMOs” announcement affixed to Chipotle’s restaurant doors explains that GMOs “don’t make the cut” “[w]hen it comes to *our food*.” (*Id.* at ¶ 37 [emphasis added].)

These examples demonstrate that Chipotle is careful and specific about what it says to consumers and that its use of the term “non-GMO” is consistently limited to the “ingredients” of *its* “food.” None of these statements – all of which are written in simple, everyday language – says anything about either the nature of the feed consumed by the animals from which Chipotle sources its meat and dairy ingredients or the third-party soft drinks that it offers. Therefore, it would not be reasonable for a consumer to read into these representations statements that are not there.

This straightforward interpretation of Chipotle’s “Non-GMO Claims” is supported by each of the domestic GMO labeling laws that have been enacted to date. Vermont passed a law (currently set to become effective July 1, 2016) requiring foods containing GMOs above a certain threshold amount to be labeled as GMO. One of the exemptions from that labeling obligation is for “[f]oods consisting entirely of or derived entirely from an animal that is itself not produced with genetic engineering, regardless of whether the animal has been fed or injected with any food, drug, or other substance produced with genetic engineering.” Vt. CP 121.03(a)(i). Connecticut and Maine have followed suit. 2013 Conn. Legis. Serv. P.A. 13-183 (H.B. 6527); 22 MRSA §§2591-2596.

Some of the literature relied upon by Plaintiffs further supports the conclusion that meat and dairy products sourced from non-GMO animals that merely consume GMO feed should not be regarded as GMOs. (*See Genetically Modified Organism (GMO) Use in the Chicken Industry* [RJN, Exh. 5] [cited at Complaint, ¶ 28, fn. 7] [explaining that, despite the fact that “almost all corn and soybean used in conventional livestock and poultry feed is genetically modified ... chickens and chicken meat are not genetically modified.”]; Ryan Beville, *How Pervasive are GMOs in Animal Feed?*, GMO Insider Blog (July 16, 2013) (RJN, Exh. 6, cited at

1 Complaint, ¶ 28, fn. 8) (“[M]any countries that have food labeling laws do not have
2 labeling requirements for animal feed, or for animal products produced from animals
3 fed GMO crops.”)

4 3. Plaintiffs’ Allegations Regarding Consumers’ Purported Understanding
5 Of Terms And Representations Other Than Chipotle’s “Non-GMO
6 Claims” Are Irrelevant.

7 Implicitly recognizing that no reasonable consumer could be deceived by
8 Chipotle’s “Non-GMO Claims” as they actually appear in context, Plaintiffs attempt
9 to cobble together an interpretation of those representations by ignoring, misstating
10 and misleadingly truncating Chipotle’s actual “Non-GMO Claims.”

11 To state a claim for deceptive advertising, Plaintiffs must proffer an objective
12 or plausible definition of the challenged term. *See Pelayo*, 989 F. Supp. 2d at 978.

13 In *Pelayo*, a consumer alleged that labeling that packaged pasta products were
14 “all natural” was false and deceptive because the products contained ingredients that
15 were unnatural, artificial or synthetic. The district court held that the plaintiff had not
16 shown “how the term ‘All Natural’ could be deceptive to a consumer acting
17 reasonably under the circumstances,” in part, because she “failed to allege either a
18 plausible objective definition of the term ‘All Natural’ or her subjective definition of
19 the term ‘All Natural’ that is shared by the reasonable consumer.” *Id.* at 980.

20 Here, Plaintiffs do not attempt to proffer a plausible definition of Chipotle’s
21 “Non-GMO Claims,” in which, as the Complaint demonstrates, Chipotle consistently
22 limits its use of the term “non-GMO” to the “ingredients” of *its* “food.” Rather,
23 Plaintiffs devote several pages at the beginning of the Complaint to analyzing terms
24 that Chipotle does not use and representations that it does not make.

25 While admitting that “the abbreviated term ‘GMO’ may generally refer to
26 genetically modified organisms,” Plaintiffs nevertheless contend that, “when used in
27 food marketing and labeling, terms like ‘non-GMO’ and ‘GMO free’ ... have a
28 broader meaning to consumers in that they convey food products do not contain and

1 are not sourced or derived from genetically engineered foods and methods, such as
 2 genetically engineered corn that ends up in corn syrup and beef from a cow that was
 3 raised on a diet of genetically engineered or modified food.” (Complaint, ¶ 19.)

4 This allegation alone is problematic in at least two respects. First, the Court
 5 has already questioned the plausibility of Plaintiffs’ position that “GMO” can mean
 6 “any organism whose genetic material has been altered using ... genetic engineering
 7 techniques” but that the term “non-GMO” can take on an inconsistent and broader
 8 meaning in the limited context of food marketing and labeling. (*See* RJN, Exh. 1, p.
 9 6; 2016 WL 454083, *4.)⁴ Second, even if Plaintiffs’ interpretation were plausible,
 10 they have not cited the Court to a single instance of Chipotle using the terms “non-
 11 GMO” or “GMO free” in isolation.

12 Undeterred in their misguided analysis, Plaintiffs devote a number of
 13 paragraphs of their Complaint to alleging how consumers and others purportedly
 14 interpret the terms “GMO,” “non-GMO” and “GMO free” when they are considered
 15 in a vacuum. (*See* Complaint, ¶¶ 19-23.) Chipotle has its doubts regarding whether
 16 the reasonable consumer actually espouses the interpretations discussed by
 17 Plaintiffs.⁵ However, even setting those concerns aside, the fundamental flaw with
 18 Plaintiffs’ allegations is that they are irrelevant to an analysis of Chipotle’s “Non-
 19 GMO Claims” because Chipotle does not use the term “non-GMO” in isolation. As
 20 reflected in the Complaint, Chipotle’s use of the term “non-GMO” is consistently

21 ⁴ Indeed, as the Court has recognized, and as Plaintiff Gallagher has previously
 22 admitted, the term “organic” better describes “non-GMO meat and dairy products
 23 sourced from animals that did not consume genetically modified feed.” (Order, p. 7
 24 [citing *Gallagher* Complaint, ¶ 38 {“Chipotle could use only meat and dairy products
 25 certified ‘Organic,’ which is labeled on products that come from animals *not* fed with
 26 genetically modified crops.”}].)

26 ⁵ Notably, despite alleging that “consumers readily and understandably associate
 27 ‘non-GMO’ marketing and similar terms with definitions set by the Non-GMO
 28 Project” (Complaint, ¶ 20), none of Plaintiffs allege that they were aware of, or relied
 upon, Non-GMO Project definitions at the time of their respective purchases from
 Chipotle. (*See id.* at ¶¶ 50-55.)

1 limited to the “ingredients” of *its* “food.” Therefore, even if it were plausible that,
 2 when used in a vacuum, the term “non-GMO” could be reasonably interpreted to
 3 extend to the nature of the feed consumed by animals from which meat and dairy
 4 ingredients are sourced, that fact is irrelevant where, as here, the term “non-GMO” is
 5 not used in a vacuum.

6 Similarly, Plaintiffs discuss in their Complaint consumer research regarding
 7 hypothetical representations that Chipotle does not make. (*See id.* at ¶¶ 24-25.)
 8 Specifically, Plaintiffs rely upon a consumer survey, apparently conducted on their
 9 behalves, asking consumers about their expectations if faced with a representation
 10 that a restaurant sells “food that does not contain GMOs.” (*Id.* at ¶ 25.) Plaintiffs
 11 also point to a poll of Ohio voters asking about their expectations in response to “a
 12 dairy product labeled as ‘non-GMO’....” (*Id.* at ¶ 24.) This research is meaningless
 13 in the context of this lawsuit because none of the questions posed to the consumers in
 14 the surveys mirrors Chipotle’s “Non-GMO Claims.” Specifically, Plaintiffs have not
 15 identified a single representation by Chipotle regarding what its food “contains” or
 16 using the term “non-GMO” in isolation.

17 Given the disconnect between Plaintiffs’ allegations and Chipotle’s actual
 18 “Non-GMO Claims,” Plaintiffs’ conclusion that “consumers reasonably understand
 19 food advertised or labeled as ‘non-GMO,’ ‘GMO free,’ ‘does not contain GMOs,’ or
 20 other similar claims only apply to food” that does not contain animal products that
 21 have a diet of GMO feed is irrelevant.

22 Because Plaintiffs have not proffered a plausible definition of the “Non-GMO
 23 Claims” that they are challenging, they have failed to state a claim for deceptive
 24 advertising.

25 **B. Plaintiffs Fail To State A Claim For Misrepresentation.**

26 Plaintiffs assert claims for intentional misrepresentation and negligent
 27 misrepresentation, both predicated exclusively upon alleged omissions. (*See*
 28 Complaint, ¶¶ 139-142.)

1 Plaintiffs’ misrepresentation claims fail because an affirmative
 2 misrepresentation is an essential element of each claim. *See Conte v. Wyeth, Inc.*,
 3 168 Cal. App. 4th 89, 101 n.7 (2008) (“intentional misrepresentation requires an
 4 assertion of fact by one not believing it to be true”); *Apollo Capital Fund, LLC v.*
 5 *Roth Capital Partners, LLC*, 158 Cal. App. 4th 226, 243 (2007) (To state a claim for
 6 negligent misrepresentation, “a positive assertion is required; an omission or an
 7 implied assertion or representation is not sufficient.”).

8 Another essential element of Plaintiffs’ misrepresentation claims is that the
 9 defendant must have made a false statement. *See Service by Medallion, Inc. v.*
 10 *Clorox Co.*, 44 Cal. App. 4th 1807, 1816 (1996) (The tort of intentional
 11 misrepresentation requires “a knowingly false representation by the defendant.”);
 12 *Diediker v. Peelle Fin. Corp.*, 60 Cal. App. 4th 288, 297 (1997) (“Where the
 13 defendant makes false statements, honestly believing that they are true, but without
 14 reasonable ground for such belief, he may be liable for negligent misrepresentation, a
 15 form of deceit.”). For the reasons set forth above, Chipotle’s “Non-GMO Claims”
 16 are not false. Indeed, Plaintiffs do not allege that they are literally false.

17 **C. Plaintiffs Lack Standing To Pursue Injunctive Relief.**

18 Despite acknowledging (*see* Complaint, ¶ 78 fn. 20) that the Court already
 19 determined that it was “entirely implausible” that Plaintiff Gallagher “risks being
 20 harmed by Defendant’s alleged misrepresentations again” and, therefore, “does not
 21 have standing to seek injunctive relief” (RJN, Exh.1, p. 4; 2016 WL 454083 at *3),
 22 Plaintiffs have prayed for injunctive relief. (*See* Complaint, Prayer for Relief, ¶ C.)

23 Plaintiffs lack standing to pursue injunctive relief. “To have standing to seek
 24 prospective injunctive relief under Article III of the United States Constitution, a
 25 plaintiff must ‘demonstrate a real and immediate threat of repeated injury in the
 26 future.’” (RJN, Exh.1, p. 4; 2016 WL 454083 at *3 [quoting *Chapman v. Pier 1*
 27 *Imports (U.S.), Inc.*, 631 F. 3d 939, 946 (9th Cir. 2011)].) “In false advertising cases,
 28 ‘where a plaintiff has no intention of purchasing the product in the future, a majority

1 of district courts have held that the plaintiff has no standing to seek prospective
 2 injunctive relief, and some have also held that a plaintiff who is aware of allegedly
 3 misleading advertising has no standing to seek prospective injunctive relief.” (*Id.* at
 4 4-5 [quoting *Davidson v. Kimberly-Clark Corp.*, 2014 WL 7247398, *4 (N.D. Cal.
 5 Dec. 19, 2014)].)

6 Plaintiffs do not allege that they intend to purchase products from Chipotle
 7 again in the future. To the contrary, Plaintiffs allege that they “would not have
 8 purchased Chipotle’s menu items at the price [they] had paid, or purchased it at all,
 9 had [they] known that Chipotle’s non-GMO and GMO free representations made
 10 were materially deceptive and misleading.” (Complaint, ¶¶ 50-55.) Thus, “[i]t is
 11 entirely implausible that Plaintiff[s] risk[] being harmed by Defendant’s alleged
 12 misrepresentations again.” (RJN, Exh.1, p. 5; 2016 WL 454083 at *3 [citing
 13 *Gershman v. Bayer HealthCare, LLC*, 2015 WL 2170214, *8 (N.D. Cal. May 8,
 14 2015)].) Therefore, Plaintiffs have “not alleged ‘a real and immediate threat’ of
 15 future injury and do[] not have standing to seek injunctive relief.” (*Id.*)

16 **D. Plaintiffs Fail To State A Claim For Unjust Enrichment And Declaratory**
 17 **Relief.**

18 Plaintiffs fail to state a claim for unjust enrichment against Chipotle because
 19 unjust enrichment is not a recognized cause of action. Specifically, “[t]he phrase
 20 ‘unjust enrichment’ does not describe a theory of recovery, but an effect: the result
 21 of a failure to make restitution under circumstances where it is equitable to do so.”
 22 *Lauriedale Assoc., Ltd. v. Wilson*, 7 Cal. App. 4th 1439, 1448 (1992); *accord McKell*
 23 *v. Washington Mut., Inc.*, 142 Cal. App. 4th 1457, 1490 (2006); *see also Hill v. Roll*
 24 *Int’l Corp.*, 195 Cal. App. 4th 1295, 1307 (2011) (affirming sustaining of demurrer to
 25 unjust enrichment cause of action).

26 Plaintiffs also fail to state a claim for declaratory relief against Chipotle
 27 because, for the several reasons set forth above, they have not alleged an actual
 28 controversy between the parties. *See* 28 U.S.C. § 2201(a).

1 **VI. CONCLUSION**

2 For the foregoing reasons, Chipotle respectfully requests that the Complaint be
3 dismissed, with prejudice.

4
5 Dated: May 17, 2016

6 MESSNER REEVES, LLP
7 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

8
9 By /s/ Sascha Henry
SASCHA HENRY

10
11 Attorneys for Defendant
12 CHIPOTLE MEXICAN GRILL, INC.
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28